No. 95-7452

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LYNCE,
*Petitioner,*

v.

HAMILTON MATHIS, Superintendent
Tomoka Correctional Institution, *et al.*,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHET KAUFMAN
Assistant Public Defender
301 South Monroe Street
Suite 401
Tallahassee, Florida 32301
(904) 488-2458
*Counsel of Record*
*on behalf of*
*Florida Public Defender*
*Association, Inc.*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24 pp

TABLE OF CONTENTS

## TABLE OF AUTHORITIES





## TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued



IN THE
# Supreme Court of the United States
OCTOBER TERM, 1996

No. 95-7452

KENNETH LYNCE,
*Petitioner,*
v.
HAMILTON MATHIS, Superintendent
Tomoka Correctional Institution, *et al.*,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

This brief is submitted by the Florida Public Defender Association, Inc., as *amicus curiae* in support of petitioner Kenneth Lynce. Counsel for petitioner Lynce, Joel T. Remland, and counsel for respondent Mathis, Susan A. Maher, have consented in writing to the Association's appearance as an *amicus* in support of petitioner's cause. Their letters of consent have been filed with the clerk.

The Florida Public Defender Association, Inc., is a nonprofit organization composed of the twenty (20)

elected Public Defenders representing each of the State's judicial circuits, their eight hundred (800) Assistant Public Defenders, and their support staffs. The Association focuses on matters relating to the administration of criminal justice in Florida, as well as matters relating to the needs and interests of public defenders in particular. The Association commonly participates as an *amicus curiae* in judicial proceedings where interests of Association members are at issue.

Thousands of former and current clients of Association members are incarcerated in the custody of the Department of Corrections of the State of Florida. Those clients are subject to the statutes of the State of Florida and regulations of the Department, including its practice of awarding, denying, and canceling provisional credits, gain time, and other such measures, all of which directly affect the length of time an inmate must serve in prison.

Many present and former clients have contacted, and continue to contact, members of this Association to determine their rights and remedies with respect to the award, denial, and cancellation of provisional credits and other such awards that make up a part of the sentencing scheme in Florida. Some clients have asked members of this Association to represent them in judicial proceedings to set aside their pleas or to seek other relief as appropriate when credits have been denied or canceled. It is not uncommon for members of this Association to be appointed by the courts of the State of Florida to represent indigent inmates who have made colorable collateral claims with respect to the legality of state sentencing and incarceration practices, and who require legal services at evidentiary hearings or in appellate proceedings, just as the Federal Public Defender was appointed to represent petitioner Lynce in the case at bar.

The State of Florida has engaged in the practice of retroactive cancellation of sentencing credits in the past, and it continues to do so today. This Association has an



abiding interest in clarifying the constitutional authority of the State of Florida to engage in such questionable practices.

## STATEMENT

One of the duties of every criminal defense lawyer in Florida is to advise clients about all the sentencing mechanisms that may affect them. This is an absolutely necessary and common practice, and it plays an active role in every client's decision-making process as to what plea to enter and whether, and to what extent, the client should bargain for a sentence. Provisional credits in particular have played a role in that daily practice. An allegation that a client relied on counsel's inappropriate advice about provisional credits eligibility provides a colorable claim of ineffective assistance of counsel under Florida law. *Eady v. State*, 622 So. 2d 61 (Fla. 1st DCA 1993); *see also Eady v. State*, 604 So. 2d 559 (Fla. 1st DCA 1992). Additionally, because a judge is not permitted to depart downward from the sentencing guidelines due to prison overcrowding considerations, *State v. Moore*, 630 So. 2d 1235 (Fla. 2d DCA 1994), a lawyer must take provisional credits and other overcrowding-related statutory mechanisms into account in the plea bargaining process.

Accordingly, the award of provisional credits has played a significant role in the conduct of criminal justice in the courts of the State of Florida. The petitioner's cause should be viewed in light of these practical considerations.

## SUMMARY OF ARGUMENT

The ex post facto clause prohibits arbitrary state action and requires states to provide fair warning that the laws have changed, entitling all persons to the right to rely on the law until the Legislature explicitly changes the law. Likewise, this Court's jurisprudence has merged these ex post facto clause principles with the identical principles of due process to prevent another branch of state govern-

ment from unforeseeably and retroactively enlarging penal law.

In the present case, the executive branch of the State of Florida, with the blessings of Florida's judicial branch, unforeseeably and arbitrarily enlarged a prospective provisional credits statute by applying it retroactively, resulting in the rearrest and reconfinement of petitioner Lynce for five more years after he had been released. The executive branch made that decision even though no explicit law change had been made by the Legislature and even though its interpretation flies in the face of the language of the law, the legislative history, and settled principles of general law. This is the epitome of arbitrariness and unfair warning prohibited by the United States Constitution.

## ARGUMENT

**THE STATE OF FLORIDA MUST NOT BE PERMITTED TO ARBITRARILY INTERPRET AND APPLY A PROSPECTIVE PROVISIONAL CREDITS STATUTE BY CLAIMING IT WAS AMENDED BY SILENCE TO BECOME RETROACTIVE, THEREBY AUTHORIZING THE STATE TO REARREST PETITIONER AFTER HE HAD BEEN LAWFULLY RELEASED FROM CUSTODY AND TO KEEP HIM IN PRISON FOR FIVE MORE YEARS.**

The question in this case boils down to whether the State of Florida is permitted to expand its interpretation of a provisional credits statute that was prospective and had not changed by claiming it had changed to become retroactive, thereby authorizing the State to rearrest and impose additional incarceration on the petitioner whom the State already had released. The answer may well rest in the merger of "arbitrariness" and "fair warning" protections long held to be both part of ex post facto clause jurisprudence and core values fundamental to the liberty interest protected by due process.



### A. The Ex Post Facto Clause Protects Citizens From Arbitrary And Unpredictable Exercises Of State Legislative Power.

History demonstrates that a core value of the ex post facto clause, U.S. Const. art. I, § 10, cl. 1, is to protect citizens against arbitrary state actions. As Alexander Hamilton observed in discussing the ex post facto clause, "arbitrary imprisonments[] have been, in all ages, [one of] the favorite and most formidable instruments of tyranny." *The Federalist Papers* No. 84, p. 512 (New American Library ed. 1961). Accordingly, this Court has held that the ex post facto clause ban was intended to "'secure against arbitrary and oppressive legislative action.'" *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30, 46 (1990) (quoting *Malloy v. South Carolina*, 237 U.S. 180, 183, 35 S. Ct. 507, 59 L. Ed. 905 (1915)); *Beazell v. Ohio*, 269 U.S. 167, 171, 46 S. Ct. 68, 70 L. Ed. 716 (1925); *see also California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588, 598 (1995) (constitutionality of California law reducing frequency of parole eligibility hearings affirmed partly because procedure was not arbitrary); *Calder v. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648 (1798) (Chase, J.) (the ban protects against "apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law").

Joined with that core value, history shows, is the requirement that a State must give fair warning to its citizens as to whether and how the State is authorized to act punitively against the individual. In this vein, James Madison said the ex post facto clause was a necessary part of the "constitutional bulwark in favor of personal security and private rights" because

> [t]he sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases af-

> fecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community.

*The Federalist Papers* No. 44, p. 282 (New American Library ed. 1961). In *Calder v. Bull*, Justice Paterson quoted Blackstone in describing how the government's duty to enable citizens to "foresee" government's punitive action is a necessary part of the constitutional protection. *Calder v. Bull*, 3 Dall. at 396 (Paterson, J.) (citing 1 Blackstone Commentaries 46). Thus, for example, in *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977), the Court found no ex post facto violation in Florida's alteration of its capital sentencing scheme after Dobbert's trial because the penal statutes provided fair warning of the quantum of punishment he faced, and that aspect of the sentencing scheme had not changed.

**B. Ex Post Facto Protections Merge With Identical Due Process Protections To Prevent Other Arbitrary And Unpredictable Exercises Of State Power.**

The Court has recognized that the ex post facto clause protections against arbitrary and unpredictable state acts are so fundamental to our concept of ordered liberty that they must be applied to restrain retroactive government action even when ex post facto legislation is not directly at issue. Accordingly, this Court expressly relied on its ex post facto clause jurisprudence to hold that when government unforeseeably expands the law by judicial interpretation and then uses that new interpretation to deprive an accused of liberty, the government violates fundamental rights protected by the due process clauses of the fourteenth amendment, *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964); *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973), and the fifth amendment, *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).



*Bouie v. Columbia* virtually merged the ex post facto and due process clauses to guard against arbitrary and unpredictable state action. The State of South Carolina prosecuted for criminal trespass two individuals who participated in a "sit in" demonstration, utilizing the theory that they violated the law by remaining in a commercial premises after being told to leave. The criminal trespass statute defined the crime as the "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry." *Id.* at 349 n.1. In affirming the convictions, a state court construed the statute expansively to include the act of remaining on the premises after receiving notice to leave. This Court threw out the convictions, relying on fair warning and arbitrariness principles underlying the ex post facto clause to inform its due process clause decision.

The Court noted that broadly applying what appears to be a facially clear and narrow statute "lulls the potential defendant into a false sense of security" because he has "no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." *Id.* at 352. Under these circumstances, ex post facto principles are directly implicated:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

*Bouie*, 378 U.S. at 353-54 (footnote omitted).

Applying this reasoning to the facts, the Court surveyed South Carolina law and determined that the statute was clear and narrow on its face, the statute had not changed, and judicial interpretation of the statute had

not given it the breadth claimed by South Carolina until after the conduct in that case had occurred. The Court reversed the convictions because the demonstrators had no "fair warning" that their conduct was unlawful.

In *Marks v. United States,* 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977), this Court underscored "fair warning" as one of the underpinnings of the constitution's ex post facto clause, and further entrenched it as a fundamental concept of liberty:

> [T]he principle on which this [Ex Post Facto] Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty.

430 U.S. at 191. Thus it is embraced within the Fifth Amendment's due process clause. *Id. Marks* applied that rationale to reverse convictions on obscenity-related charges because the trial judge erroneously had instructed the jury under the new and expansive standards of *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), rather than the more narrow standard formulated by *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), which had been the law when the offenses occurred.

This Court similarly reversed a Missouri court's probation revocation order in *Douglas v. Buder,* 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973). Douglas had been on probation, a condition of which required that he report all "arrests" "without delay." 412 U.S. at 431. He was involved in a multi-car traffic accident, was cited for speeding, and reported that citation to his probation officer eleven days later. A Missouri state court found his report to be tardy in violation of that condition of his probation and sentenced him to prison. A state appellate court affirmed. This Court, however, concluded in part that the state court's decision unconstitutionally expanded the interpretation of "arrest" under Missouri law retro-



actively to include a "traffic citation" within its reach when prior state law did not support such a broad definition. 412 U.S. at 432.

Just as this Court used ex post facto clause jurisprudence to inform its due process clause decisions, so too should the Court use its due process clause jurisprudence to inform the decision in this case. The executive branch of the State of Florida, aided by the judicial branch, unforeseeably applied a statute in a retroactive manner even though that statute, historically and facially, was prospective only and the Legislature gave no fair warning that it had changed. The fair warning and arbitrariness protections these clauses provide are identical and overlap to limit state action infringing on liberty in the context of the peculiar circumstances presented here. *Cf. Landgraf v. USI Film Products,* 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229, 252 (1994) (demonstrating the unity of purpose of the ex post facto and due process clauses as reflected in general legal policy against retroactivity).

### C. Florida's Executive Branch Arbitrarily Decided To Change Florida Law After Petitioner Had Won His Freedom.

The best way to see how these merged principles apply is to examine the way the Florida law changed, beginning with the adoption of the provisional credits statute. When the Legislature created provisional credits in 1988, as amended prior to 1992, the Legislature said nothing whatsoever to even suggest that provisional credits, once lawfully awarded, might be subject to retroactive cancellation. *See* chs. 89-100, §§ 4, 6, 89-526, § 5, Laws of Fla. (codified at § 944.277, Fla. Stat. (1989)); chs. 90-337, § 14, 90-186, §§ 1, 4, Laws of Fla. (codified at § 944.277, Fla. Stat. (Supp. 1990)); ch. 91-280, §§ 14, 17, Laws of Fla. (codified at § 944.277, Fla. Stat. (1991)). Certainly the text of these enactments provide no fair warning within

the meaning of the ex post facto clause to indicate the Legislature's intent to make these credits subject to retroactive cancellation, even if the State constitutionally could provide and enforce such notice.

Likewise, the 1992 amendment at issue, which became effective July 6, 1992, Ch. 92-310, § 37, Laws of Fla., says not one word about authorizing the State to retroactively cancel lawfully awarded provisional credits. Instead, the legislation is wholly silent as to the matter, so the text again gives no fair warning that retroactive cancellation would be permissible under state law, even if the Legislature constitutionally could do so. *See* ch. 92-310, § 12, Laws of Fla. (codified at § 944.277, Fla. Stat. (Supp. 1992)).

A thorough examination of the legislative history of chapter 92-310 also shows that no retroactive effect had been intended. Not one of the three lengthy staff analyses conducted by the House Committee on Corrections mentions a word about retroactively canceling provisional credits in the 1992 amendment. Instead, the 1992 amendment to section 944.277 had three exclusive and distinct purposes:

> To clarify the intent of the Legislature, a person who has ever been convicted as an habitual offender *at any time*, and any person who is convicted, or has *ever* been convicted, of committing or attempting to commit kidnapping, burglary, or murder, and the offense was committed with the intent to commit sexual battery or a sex act was attempted or completed during commission of the offense, shall not be eligible for provisional credits.
>
> In addition, the department is authorized to rely on any document leading to or generated during the course of the criminal proceedings, including, but not limited to, any presentence investigation or any information contained in arrest reports relating to circumstances of the offense when making provisional credit eligibility determinations.



Fla. H.R. Comm. on Corrections, CS/2d ENG/HB 197-H, 19-H, 131-H, Staff Analysis 23 (July 8, 1992) (emphasis in original); Fla. H.R. Comm. on Corrections, CS/HB 197-H, 19-H, 131-H, Staff Analysis 22 (June 3, 1992); Fla. H.R. Comm. on Corrections, HB 197-H, Staff Analysis 25 (May 29, 1992) [maintained in Series 19, Carton 2382, Florida State Archives, Tallahassee, Florida]. Moreover, had the Legislature intended to cancel provisional credits for thousands of prisoners, *see* footnote 3, *infra,* certainly the fiscal impact would have been great. Yet neither the Department of Corrections nor the Legislature saw such a fiscal impact in the 1992 amendment:

> The department [of Corrections] reports that, by denying provisional credits and control release to the inmates covered by the bill, it is expected that the time served in prison will be increased for a relatively small number of inmates; however, since provisional release and control release are emergency release mechanisms, there is no way to determine when and how many inmates would be affected.

July 8 Staff Analysis at 33; June 3 Staff Analysis at 32; May 29 Staff Analysis at 35.

Contrast these facts with what the Legislature expressly put in the law. The statutory exclusion making provisional credits unavailable to prisoners convicted of murder or attempted murder affected only those who committed their crimes on or after January 1, 1990. *See* ch. 89-100, § 6, Laws of Fla. (the act creating the murder/attempt exclusion in section 944.277(1)(i) "shall take effect January 1, 1990, and shall apply to offenses committed on or after the effective date").

The Florida judiciary recognized the prospective nature of that statute and recognized a constitutional distinction created by the way in which the Legislature implemented section 944.277(1)(i). Two months *before* petitioner Lynce's release, a Florida appellate court held that a

prisoner incarcerated for a murder committed prior to the January 1, 1990, effective date of section 944.277(1)(i), could not be denied provisional credits retroactively. *Dominguez v. State*, 17 Fla. L. Weekly D1853 (Fla. 1st DCA July 29, 1992), *revised on rehearing on other grounds*, 606 So. 2d 757 (Fla. 1st DCA 1992). The Court held that the Florida Supreme Court's prior decisions permitting retroactive denial of provisional credits under *other, preexisting* portions of section 944.277, *Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991), *cert. denied*, 502 U.S. 1037, 112 S. Ct. 886, 116 L. Ed. 2d 790 (1992), and *Felk v. Dugger*, 589 So. 2d 905 (Fla. 1991), *cert. denied*, 504 U.S. 918, 112 S. Ct. 1961, 118 L. Ed. 2d 562 (1992), were not controlling because the 1989 amendment that added section 944.277(1)(i), was prospective. Moreover, the Attorney General of Florida acknowledged that Florida law prior to the 1992 amendment did not provide for retroactive cancellation of lawfully awarded provisional credits. Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992) (Appended to Petitioner's Brief).

Thus, the only "fair warning" provided by Florida law at the time of petitioner Lynce's release was that petitioner Lynce and others similarly situated could not, retroactively, be denied the benefit of lawfully awarded provisional credits. This was apparent on the face of the statute and from its history, and was made even more clear by the Florida judiciary in *Dominguez*. The Department of Corrections recognized this to be the case and recognized *Dominguez* as authoritative at the time of petitioner Lynce's release. *See* letter of Department of Corrections Secretary Harry K. Singletary to Attorney General Robert A. Butterworth, (Dec. 30, 1992) (Appended to Petitioner's Brief).

Two months after *Dominguez* was decided, the Department of Corrections complied with *Dominguez* by awarding Petitioner Lynce the 1,860 days of provisional credits that he had been awarded under section 944.277(1)(i)



since they became available in 1988, and by releasing him pursuant to those credits on October 1, 1992. *See* Joint Appendix 50. Under these circumstances, the State cannot make a legitimate claim that it made a "mistake" when it discharged the petitioner, when in fact it was following controlling law at the time.

The first time the State of Florida indicated it had changed its view of Florida law came about on December 29, 1992, 89 days after petitioner Lynce's release from custody. On that day, the Attorney General issued a written opinion to resolve a hot political issue raised by two elected officials who were concerned about the impending release of a single prisoner, Donald Glenn McDougall, into their central Florida community. The Attorney General opined that McDougall could be kept behind bars. To accomplish that, he inferred from the absence of a date of application in the 1992 recodification of section 944.277(1)(i), that the 1992 amendment changed the law and opened the door to permit retroactive cancellation of provisional credits. To reach that opinion, the Attorney General distinguished *Dominguez* and tried to limit it to its facts. Op. Att'y Gen. Fla. 92-96 (Dec. 29, 1992); *see also* letter of Attorney General Robert A. Butterworth to Department of Corrections Secretary Harry K. Singletary, Dec. 31, 1992) (Appended to Petitioner's Brief).[1]

The Florida Attorney General's Opinion was not controlling or binding authority under Florida law, *e.g. State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993), and the Supreme Court did not cite it when, in an

[1] Arguably, the Attorney General's Opinion could have been read to violate bill of attainder and due process clause principles as applied to McDougall. *See Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951) (reversing dismissal of complaints by three organizations charging that the Attorney General had unconstitutionally included them on lists of subversive organizations); Lawrence Tribe, *American Constitutional Law*, 660 (2d ed. 1988).

original proceeding decided in a one-paragraph unreported opinion on April 29, 1993, it denied habeas corpus relief to an inmate whose provisional credits had been canceled. *Ipnar v. Singletary*, 620 So. 2d 761 (Fla. 1993) (table).[2]

Interestingly, the *Ipnar* decision also had no controlling authority under Florida law. *Department of Legal Affairs v. District Court of Appeal*, 434 So. 2d 310, 312 (Fla. 1983) (repudiating the precedential value of unpublished decisions issued with or without opinions). *Accord* 11th Cir. R. 36-2 (unpublished opinions have no controlling authority). Nonetheless, the State seized upon the unpublished opinion as judicial authorization to rearrest petitioner Lynce: Four days later, on May 3, 1993, it issued an Affidavit for Retaking Prisoner (Lynce), and got a court order fourteen (14) days thereafter to rearrest Lynce. *See* Joint Appendix 51.[3]

---

[2] The text of the *Ipnar* opinion, maintained in the public records of the Supreme Court of Florida, said in full:

> Petitioner's scheduled release from prison due to provisional credits was canceled by the Department of Corrections. Under these circumstances, Petitioner is not entitled to relief. *See Dugger v. Rodrick*, 584 So. 2d 2 (Fla. 1991). Accordingly, the Petition for Writ of Habeas Corpus is denied.
>
> It is so ordered.

[3] Petitioner Lynce was not alone. The Department issued warrants/orders to reincarcerate 164 inmates whom it had released. The Department caused 135 freed persons to be returned to custody. For 18 others, the warrants were ineffective because their sentences had fully expired while out of custody. Three died before their warrants could be served. Eight warrants were still outstanding as of July 9, 1996, including four for individuals deported or held for deportation and four for individuals whose whereabouts are unknown. In all, the Department retroactively canceled provisional credits for 2,789 individuals pursuant to its new-found interpretation of the 1992 amendment.

The same scenario arose in 1993 when the Legislature rescinded the provisional credits statute altogether, along with administrative gain time. Ch. 93-406, § 32, Laws of Fla. (codified at § 944.278, Fla. Stat. (1993)). Pursuant to that act, the Department retroactively canceled provisional credits for 4,155 persons. Letter of Department of Corrections to Chet Kaufman, July 9, 1996. A copy is printed in the appendix to this brief.



The Supreme Court of Florida finally published an opinion on the subject more than a year later, on May 19, 1994, denying habeas corpus relief in *Griffin v. Singletary*, 638 So. 2d 500 (Fla. 1994), a case similar in many respects to the case at bar. The Court held that section 944.277(1)(i), as amended in 1992, constitutionally had been applied retroactively to cancel provisional credits awarded during Griffin's incarceration, which commenced in 1986, the same year he committed his crime.

### D. The Retroactive Application Of A Law That Had Not Changed Was Arbitrary And Unpredictable, In Violation Of Ex Post Facto/Due Process Principles.

Two compelling conclusions can be reached from these facts, and both support petitioner's cause. First, the executive branch's decision had no valid basis in Florida law. The statutory authority it invoked when it canceled petitioner Lynce's credits did not provide for retroactive cancellation of provisional credits, contrary to the opinion of the Attorney General. This Court recently invoked the principles of ex post facto clause and due process clause jurisprudence to say,

> As Justice Scalia has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.

*Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229, 252 (1994). That presumption generally applies in the absence of a clear, contrary statement of intent by the Legislature. *See, e.g., id.*, 128 L. Ed. 2d at 254. Here, however, no clear statement indicating a contrary legislative intent can be found. At worst, the 1992 amendment was facially uncertain as to whether it authorized retroactive cancellation, and its un-

certainty was not revealed until three months after petitioner Lynce's release. Under these facts, the retroactive destruction of petitioner Lynce's liberty epitomizes the kind of unpredictable and arbitrary state action condemned by principles underlying the ex post facto clause. *Cf. California Dep't of Corrections v. Morales*, 115 S. Ct. 1597, 131 L. Ed. 2d 588, 598 (1995) (system reducing parole eligibility hearings was clear, the procedure was "carefully tailored" not to allow arbitrary determinations, and the prisoner in that case certainly had not been denied a hearing arbitrarily).

The second compelling conclusion is that the State of Florida is in much the same position as the wrongful government actors in *Bouie v. Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), *Douglas v. Buder*, 412 U.S. 430, 93 S. Ct. 2199, 37 L. Ed. 2d 52 (1973), and *Marks v. United States*, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). Because the statute had not changed in the 1992 amendment, as demonstrated above, Florida law did not really change until long after petitioner Lynce had won his freedom on October 1, 1992. The Attorney General first stirred the pot with his opinion on December 29, 1992; the Florida Supreme Court decided *Ipnar v. Singletary* on April 29, 1993; and the Florida Supreme Court officially proclaimed the law changed by publishing *Griffin v. Singletary* on May 19, 1994. That retroactive expansion of Florida law certainly could not be foreseen from the Legislature's silence in its July 1992 recodification of section 944.277. The State of Florida's decision to terminate petitioner Lynce's liberty under these circumstances flies in the face of this Court's ex post facto clause/due process clause jurisprudence.

The State of Florida should not be permitted to do what this Court prohibited in other cases. The United States Constitution is just a shadow of what the Framers intended if it is read to allow the State to reincarcerate



an individual for five years after lawfully releasing him on the same charge. Denying relief in this case would violate rights "fundamental to our concept of constitutional liberty." *Marks v. United States*, 430 U.S. at 191.

## CONCLUSION

For the reasons stated above and in petitioner Lynce's brief on the merits, this Court should grant the relief petitioner seeks and reverse the judgment under review.

Respectfully submitted,

CHET KAUFMAN
Assistant Public Defender
301 South Monroe Street
Suite 401
Tallahassee, Florida 32301
(904) 488-2458
*Counsel of Record*
*on behalf of*
*Florida Public Defender*
*Association, Inc.*

# APPENDIX

## APPENDIX

**Letter of Department of Corrections to Chet Kaufman, dated July 9, 1996**

[Logo]

FLORIDA
DEPARTMENT OF
CORRECTIONS

An Affirmative Action/Equal Opportunity Employer

Governor
LAWTON CHILES

Secretary
HARRY K. SINGLETARY, JR.

---

2601 Blair Stone Road
Tallahassee, FL 32399-2500

July 9, 1996

Chet Kaufman
Assistant Public Defender
Office of the Public Defender
Leon County Courthouse, Suite 401
Tallahassee, Florida 32301

Re: Kenneth Lynce v. Hamilton Mathis
No. 95-7452, United States Supreme Court

Dear Mr. Kaufman:

As you requested, I am supplying the following information relative to the number of offenders affected by the 1992 amendments to section 944.277 effective July 6,

1992, which required retroactive cancellation of overcrowding (provisional) credits for two groups of offenders formerly eligible for early release because of prison overcrowding and the number of offenders affected by the 1993 legislation creating section 944.278 which required the retroactive cancellation of overcrowding credits (both administrative gaintime under former section 944.276 and provisional credits under former section 944.277) for all offenders in custody on the effective date of June 17, 1993.

As I explained to you this week, when the 1992 amendments became effective on July 6, 1992, the department did not recognize that the amendments to section 944.277 and the reenactment of sections 944.277(1)(h) and 944.277(1)(i) required retroactive cancellation of all provisional credits for the two groups enumerated in subsections (1)(h) and (1)(i). Accordingly, the department did not perform the retroactive cancellation on July 6, 1992, for these groups of offenders and a couple hundred offenders were erroneously released between the effective date of July 6, 1992, and the issuance of the opinion of the Attorney General 92-96 in December 1992 in which the Attorney General pointed out the retroactive nature of the two subsections. The department immediately stopped further releases of these groups and subsequently cancelled provisional credits for 2,789 offenders in those two offense categories who were still in custody. Warrants were issued or court orders were entered to return to custody the offenders in those two offense categories who were erroneously released after July 6, 1992. The sentences of these offenders continued to run while erroneously released. A total of 164 warrants/orders were issued. Of those, 135 offenders were returned to custody, 18 offenders completed their sentences while out of custody, 3 offenders died, and 8 warrants are outstanding (3 of the outstanding warrants are for offenders being held for deportation, 1 offender was deported, and the locations of 4 offenders are unknown).



Section 944.278 which became effective the following year on June 17, 1993, required the cancellation of both administrative gaintime and provisional credits. On the effective date of the law, 4,155 offenders were in custody that were affected by the cancellation. Figures for subsequent cancellations for offenders returned to custody since June 17, 1993, for revocation of post-release supervision for which overcrowding credits were cancelled are not available.

I hope this answers the questions that you posed to me earlier this week.

Sincerely,

/s/ Susan A. Maher
SUSAN A. MAHER
Deputy General Counsel